

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Request for Arbitration of XO California, Inc. of an Amendment to an Interconnection Agreement with SBC California pursuant to Section 252(b) of the Communications Act of 1934, as amended.

Application 04-05-002  
(Filed May 3, 2004)

**ADMINISTRATIVE LAW JUDGE'S RULING  
DENYING MOTION TO DISMISS**

On May 3, 2004, XO California, Inc. (XO) filed the above-captioned request for arbitration seeking resolution of certain disputed issues arising between XO and SBC California (SBC) in the negotiation of an amendment to the parties' existing interconnection agreement.

On May 17, 2004 SBC moved to dismiss the request for arbitration, arguing that XO has invoked the wrong procedure. According to SBC, XO asks the Commission to resolve a dispute under an existing interconnection agreement, namely how the agreement should be amended pursuant to "change of law" provisions to reflect the recent "Triennial Review Order" (TRO)<sup>1</sup> of the Federal Communications Commission (FCC). In SBC's view, the Commission does not

---

<sup>1</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, (CC Docket No. 01-338, 96-98, and 98-147); Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, (rel. Aug. 21, 2003) ("Triennial Review Order").

have jurisdiction to adjudicate this dispute under Section 252(b) of the Communications Act (Act) because that section does not apply to negotiations initiated by SBC to amend an existing interconnection agreement.<sup>2</sup> In SBC's view, the arbitration process only applies when a carrier requests interconnection from an incumbent local exchange carrier (ILEC), but not when an ILEC initiates negotiations for amendments. SBC requests that this docket be terminated so that XO can re-initiate proceedings "under the correct procedure." SBC contends that the parties should use AAA arbitration for dispute resolution, as provided in the existing interconnection agreement, or the parties could agree to have the Commission resolve the issues, though not in a proceeding pursuant to Section 252(b).

XO opposes SBC's motion to dismiss, stating that Section 252 of the Act and the TRO provides the Commission ample jurisdiction to arbitrate the dispute. According to XO, the disagreement between XO and SBC does not arise "under the existing interconnection agreement," but arises from a disagreement in interpretation of the TRO and the contract language necessary to implement that order. XO contends that the FCC's TRO supports use of the arbitration procedures in Section 252(d).

---

<sup>2</sup> Section 252(a) states in pertinent part, "Upon receiving a request for interconnection, services, or network elements pursuant to Section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier...." Section 252(b)(1) states, "During the period from the 135<sup>th</sup> to the 160<sup>th</sup> day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a state commission to arbitrate any open issues."

## Discussion

The dispute over how to amend the existing interconnection agreement between XO and SBC arises from amendments necessary to implement the FCC's TRO. In the TRO, the FCC envisioned disputes of this type, and provided guidance. First, the FCC declined to override the Section 252 negotiation and arbitration process and unilaterally change all interconnection agreements. (TRO, para. 701.) Rather, the FCC noted that many interconnection agreements contain change of law provisions and a mechanism to resolve disputes about new agreement language. (*Id.*, para 700.)<sup>3</sup> Where agreements are silent on change of law and/or transition timing, the FCC required ILECs and competitive local exchange carriers (CLCs) "to use Section 252(b) as a default timetable for modification of interconnection agreements." (*Id.*, para 703.) The FCC further stated that where a negotiated agreement cannot be reached, parties would submit their requests for state arbitration according to the timelines in Section 252(b). (*Id.*) Second, the FCC found that the Section 252 process "provides good guidance even in instances where a change of law provisions exists..." and that where a change of law provision envisions a state role, a state commission should be able to resolve a dispute over contract language within the arbitration timelines contained in Section 252. (*Id.*, para 704.)

---

<sup>3</sup> The FCC clarified, "Although Section 252(a)(1) and 252(b)(1) refer to requests that are made *to* incumbent LECs, we find that in the interconnection amendment context, either the incumbent or the competitive LEC may make such a request, consistent with the parties' duty to negotiate in good faith pursuant to Section 251(c)(1)." (TRO, para. 703, n. 2087.) (Emphasis in original.)

The existing interconnection agreement between SBC and XO contains several provisions worth noting.<sup>4</sup> First, Section XVI refers to dispute resolution through AAA arbitration “in the event of a default or violation hereunder, or for any dispute arising under this agreement....” The same section also states that:

The above procedure shall apply only to disputes arising under this Agreement or related agreements and shall not apply to claims which arise under the Act apart from this Agreement and/or which are subject to the arbitration and mediation procedures established by the Act. Such other claims shall be resolved in federal court, or by the FCC or appropriate state commission, as provided by the Act.

Section XVIII of the agreement states that the agreement shall at all times be subject to review by the Commission or FCC as permitted by the Act. Section XIV states that if any “final and nonappealable legislative, regulatory, judicial or other legal action” renders the agreement inoperable or materially affects its terms, the parties shall renegotiate new terms in good faith. After 90 days, any dispute shall be referred to the dispute resolution procedures set forth in the agreement.

After reviewing the language in the TRO and provisions of the existing agreement, I find that the Commission has jurisdiction to resolve this dispute over how to amend the interconnection agreement.

First, I agree with XO that dispute resolution through AAA arbitration, as SBC suggests, does not apply. Although the agreement contains change of law provisions that refer to dispute resolution, the agreement states that dispute resolution does not apply to claims which arise under the Act and which are

---

<sup>4</sup> See XO Opposition to Motion to Dismiss, Exhibit 1, 5/24/04.

subject to arbitration and mediation. I agree with XO that this dispute does not arise under the agreement, but arises from the Act because it pertains to the interpretation of the FCC's TRO implementing the Act. The language in Section XVI of the agreement exempts claims arising from the Act from the dispute resolution process.

Second, based on my finding above that the dispute resolution process does not apply, I further find that guidance from the FCC in its TRO does not support SBC's motion to dismiss. The FCC clearly discusses the arbitration process for disputes in negotiating amendments to implement the TRO, including disputes arising under change of law provisions of existing agreements. (TRO, para. 703 and 704.) The FCC was clear that where disputes arise over amendments to implement the TRO, the Section 252 process applied and state commissions should arbitrate them.

Third, I disagree with SBC's argument that the Commission has no jurisdiction to adjudicate the amendment of an interconnection agreement under Section 252(b) for several reasons. By SBC's logic, although the Commission reviews the initial agreement to ensure it complies with all of the requirements set forth in the Sections 251 and 252 of the Act, it has no power to later ensure amendments also comply. In other words, once the Commission initially approves an agreement, SBC could initiate negotiations to amend it entirely and avoid Commission scrutiny. This would be an absurd result. In addition, SBC claims Section 252 does not apply for requests it initiates. However, this claim is squarely addressed by the FCC in the TRO where it states that amendments to implement the TRO can be initiated by either an ILEC or a CLC. (TRO, para. 703, n. 2087.)

Therefore, **IT IS RULED** that SBC California's motion to dismiss the arbitration request of XO California, Inc. is denied.

Dated June 8, 2004, at San Francisco, California.

/s/ DOROTHY J. DUDA

Dorothy J. Duda  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion to Dismiss on all parties of record in this proceeding or their attorneys of record.

Dated June 8, 2004, at San Francisco, California.

/s/ ELIZABETH LEWIS

Elizabeth Lewis

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

\*\*\*\*\*

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.